IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1807

LARRY AULT
Petitioner

VERSUS

STATE OF GEORGIA
Respondent

Petition for a Writ of Certiorari to
The Court of Appeals of the State of Georgia

PETITION ON BEHALF OF THE PETITIONERS

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CASE CITATIONS

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CONSTITUTION AND STATUTES

IN THE

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STATE OF GEORGIA
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Petition for a Writ of Certiorari to The Court of Appeals of the State of Georgia

PETITION ON BEHALF OF THE PETITIONERS

The Petitioner, LARRY AULT, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals of the State of Georgia, rendered in these proceedings on January 11, 1979, Case No. 57045.

OPINION BELOW

The opinion of the Court of Appeals of the State of Georgia (Appendix A, infra) is Case No. 57045, handed down on January 11, 1979. A motion to rehear and reconsider such opinion was filed by appellant in such

Court of Appeals of Georgia. An order denying such motion for rehearing was issued by the Court of Appeals of Georgia on January 25, 1979 (Appendix B, infra). Appellant did file an application for a writ of certiorari with the Supreme Court of Georgia. An order denying such application for writ of certiorari was rendered on March 7, 1979 (Appendix C, infra).

JURISDICTION

The Judgment of the Court of Appeals of the State of Georgia was rendered on January 11, 1979. An order denying appellant's motion to rehear and reconsider such opinion was entered on January 25, 1979. Appellant did file an application for a writ of certiorari with the Supreme Court of Georgia. An order denying such petition for writ of certiorari was entered by the Supreme Court of Georgia on March 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

I. WHETHER GEORGIA CODE ANNOTATED SECTION 79A-1105 (Acts 1967, pp 373) WHICH PLACES THE BURDEN OF PROOF OF CERTAIN STATUTORY EXCEPTIONS STATED WITHIN THE GEORGIA CONTROLLED SUBSTANCES ACT (Acts 1974, pp 221, 223). UPON THE DEFENDANT, IN A CRIMINAL TRIAL, UNDER SAID ACT, DOES SO IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II. WHETHER GEORGIA CODE ANNOTATED SECTION 79A-1105 (Acts 1967, pp 296, 373), WHICH PLACES THE BURDEN OF PROOF, OF CERTAIN STATUTORY EXCEPTIONS STATED WITHIN THE GEORGIA CONTROLLED SUBSTANCES ACT (ACT 1974, pp 221, 223), WAS APPLIED IN SUCH A MANNER IN APPELLANT'S TRIAL SO AS TO VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The pertinent portion of the Fourteenth Amendment of the United States Constitution states: "... nor shall any State deprive any person of life, liberty, or property without due process of law ..."

The pertinent portion of Georgia Code Annotated Section 79A-1105 reads:

> "In any complaint, information, or indictment charging any violation of any provision of this Title, and in any action or proceeding brought for the enforcement of any provision of this Title, it shall not be necessary to negative any exception, excuse, proviso, or exemption contained in this title, and the burden of proof of any exception, excuse, proviso, or exemption shall be upon the defendant.")Acts 1967, pp 296, 373)

The pertinent portion of Georgia Code Annotated Section 79A-811(b) reads:

"Except as authorized by this Chapter, it is unlawful for any person to . . . sell . . . any controlled substance." (Acts 1974, pp 221, 243; 1975 pp 1112, 1113).

STATEMENT OF FACTS

Appellant was tried and convicted on two counts of violation of the Georgia Controlled Substance Act, in Whitfield County Superior Court in December of 1977. Appellant was charged in a bill of indictment on said two charges, devoid of language not pertinent to this appeal, as follows:

COUNT ONE:

"Larry Ault . . . did unlawfully then and there sell a quantity of amphetamines . . . not being authorized in any provision of the Georgia Controlled Substances Act to do so . . ."

COUNT TWO:

"Larry Ault . . . did, unlawfully . . . then and there sell a quantity of chloral hydrate . . . not being authorized under any provision of the Georgia Controlled Substances Act to do so . . ."

The Trial Court in said case did charge the following, devoid of language not pertinent to this appeal, to the jury:

"I charge you that, except as authorized by the Georgia Controlled Substances Act, it is unlawful and it is a felony for any person to sell any controlled substance. I charge you that this defendant does not, come within any exception authorized by the Georgia Controlled Substances Act" (Transcript of the

Proceedings tried before the Whitfield County Superior Court, December 14, 15, 1977, page 120).

Appellant did file a motion for a new trial with the Trial Court of Whitfield County, Georgia. Such motion for a new trial did contain the basic questions presented to this Court. (See Enumerated Grounds #16 and 17, in Appellant's Amended Motion for a New Trial in the Whitfield County Superior Court). After such motion for a new trial was adversely ruled upon, appellant did file an appeal to the Court of Appeals of Georgia from the denial of his motion for a new trial. Such enumerations of error contained within such appeal did contain the basic questions presented to this Court (See Enumerations of Errors #10, 11, 12, and 13, of Appellant's Listed Enumerations of Error, filed in the Court of Appeals of Georgia). The Court of Appeals of Georgia did enter an opinion on January 11, 1979, confirming the judgment of the Trial Court of Whitfield County, *AULT V. STATE*, file no. 57045. A motion to rehear and reconsider such opinion was filed by appellant in said Court of Appeals of Georgia. An order denying such motion for rehearing was entered by the Court of Appeals of Georgia on January 25, 1979. Appellant did file an application for a writ of certiorari with the Supreme Court of Georgia. An order denying such application for writ of certiorari was rendered on March 7, 1979. A notice of Appeal to the Supreme Court of the United States and a motion to Stay Remittitur was filed with said Georgia Court of Appeals. An order was issued by said Court of Appeals staying the remittitur in said styled case and was entered on March 30, 1979.

REASONS FOR GRANTING THE WRIT

This case presents a question of substantial importance in the administration of criminal justice concerning the power of a state to shift the burden of proof in criminal cases. The rights of a state legislature to shift such a honorus burden upon the defendant, has been discussed by decisions of this Court in recent years, however, there is certain confusion in this area and the issues brought forth in this case could be used to resolve these matters in a more definite light.

I.

WHETHER GEORGIA CODE ANNOTATED SECTION 79A-1105 (Acts 1967, pp 296, 373), WHICH PLACES THE BURDEN OF PROOF, OF CERTAIN STATUTORY EXCEPTIONS STATED WITHIN THE GEORGIA CONTROLLED SUBSTANCES ACT (Acts 1974, pp 221, 223) UPON THE DEFENDANT, IN A CRIMINAL TRIAL, UNDER SAID ACT, DOES SO IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

It is a well established principle in this country that the burden . . . is on the State to prove that an accused has committed an act bringing him within a criminal statute. *JOHNSON V. FLORIDA*, 391 US 596, 20 L Ed 2d 838, 88 S Ct. 1713.

It has been consistently held that the DUE PROCESS CLAUSE of the Fourteeneth Amendment to the United States Constitution protects the accused against conviction except upon proof beyond a reasonable doubt of every fact

necessary to constitute the crime with which he is charged. *IN RE WINSHIP*, 397 US 358, 25 L Ed 2d 368, 90 S Ct. 1068. This principle is a bedrock of our system of American jurisprudence.

However, this Court has allowed State legislators certain latitude in shifting the burden of proof in criminal cases. In some instances the State is aided by a presumption or a permissible inference. These procedural devices require or permit the trier of fact to conclude that the prosecution has met its burden of proof with respect to the presumed or inferred fact by having satisfactorily established other facts. Thus, in effect, they require the defendant to present some evidence contesting the otherwise presumed or inferred facts. Since the State has thus shifted the production burden to the defendant, it has been held that these devises must satisfy certain due process requirements. *BARNES V. UNITED STATES*, 412 US 837, 37 L Ed 380, 93 S Ct. 2357.

Because the States have been allowed some latitude in drafting their own criminal statutes and because of the constitutional requirements within which the States must work, there has arisen a question of just how far a State may go in drafting such presumptions or permissible influences or any other statute which may shift the burden of proof in a certain set of circumstances to the accused.

The Barnes decision, supra, relates the judicial history of allowable and nonallowable statutory inferences and presumptions. This history shows several tests being related by this Court. *TOT V. UNITED STATES*, 319 US 463, 467, 87 L Ed 1519, 63 S Ct. 1241, states that there must

be a rational connection between the fact proved and the ultimate fact presumed. This Court has reached diverse results relying upon the Tot decision, supra, and did refine its constitutional test in this area in *LEARY V. UNITED STATES* 395 US 6, 23 L Ed 2d 57, 89 S Ct. 1532. The Leary Court, supra, stated that an inference is "irrational," or "arbitrary", and hence unconstitutional unless it can be said within substantial assurance that the presumed fact is more likely than not to flow from the proved fact upon which it is made to depend. This Court in the Barnes decision, supra, solidified these tests by specifically looking to a criminal prosecution and calling upon another standard identified as the "reasonable doubt standard". This was more fully explained by stating that a statutory inference submitted to the jury was sufficient to support a conviction if it satisfied the reasonable doubt standard, that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact, beyond a reasonable doubt, as well as, the more — likely — than — not standard, then it clearly accords with due process.

Our statute in question, does not use the term inference or presumption. However, in substance it obviously states that if a person sells a controlled substance then it is presumed that he does not fall within the allowed exceptions, and that he must prove that he indeed does fall within such statutory exceptions. The basic requirement for selling a controlled substance to be a crime is that such selling be unlawful. Unless such selling is unlawful, i.e. outside of the statutory exceptions, it is not a crime. The Georgia statute which defines the crimes in questions states,

> "Except as authorized by this chapter, it is unlawful for any person to . . . sell . . . any controlled substance." Acts 1974, pp 221, 223; 1975, pp 1112, 1113. Georgia Code Annotated Section 79A-811 (b).

Thus before the selling of a controlled substance can be a crime, such act must fall outside the exceptions listed in that chapter. Such exception being made a part of the definition of such crime. Applying the "Tot" standard, is there a rational connection between the fact proved, i.e. the selling of a substance, and the ultimate fact presumed, i.e. that the selling was unlawful(within the nonauthorized group)? Appellant contends that there is no rational connection between the fact of selling such a substance, and the assumption of the ultimate fact, which should be proved, i.e. that the selling is unlawful.

Nor can the Leary test be passed by this statute. It cannot be said with substantial assurance that the presumed fact, i.e. that unlawful selling, is more likely than not to flow from the proved fact, i.e. the selling. The standard applied in the Barnes case, supra, which appears to be more stringent than the others can certainly not be met. The evidence necessary to invoke the inference, i.e. the selling, is certainly not sufficient for a reasonable juror to find the inferred fact, i.e. unlawful selling, beyond a reasonable doubt. Thus, the Georgia statute Section 79A-1105 certainly fails to meet any of the previously mentioned tests for constitutionality as set out by this Court.

These old tests are still present, however, new lines of demarcation have been drawn in this area by recent

decisions of this Court. A landmark case in this area is *MULLANEY V. WILBUR*, 421 US 684, 44 L Ed 2d 508, 95 S Ct. 1881. This Court in the Mullaney decision, considered how far a State statute may go in shifting burden of proof in a criminal case, in the setting of whether a Maine statute, which required the defendant to prove by a fair preponderance of evidence, that he acted in heat of passion or sudden provocation in order to reduce a homicide from murder to manslaughter, was constitutional when compared to the DUE- PROCESS CLAUSE of the United States Constitution. In the Mullaney trial the Court charged to the jury that "if the prosecution established that homicide was both intentional and unlawful, malice of forethought was to be conclusively implied unless the defendant proved by fair preponderence of the evidence that he acted in the heat of passion of sudden provocation". The appellant in that case contended that he was denied due process because he was required to mitigate the element of malice of forethought by proving that he acted in the heat of passion of sudden provocation, relying on In re Winship, an earlier decision of this Court. The State in that case contended that Winship, supra, did not apply because the issue of heat of passion was not a fact necessary to constitute the crime of felonious homicide. This Court found that the Maine statute was unconstitutional in that the State had affirmatively shifted the burden of proof to the defendant, and that this Court was concerned with substance rather than form because the issue of sudden heat obviously beared upon the gravity of the crime and the two crimes (murder and manslaughter) differed significantly; and, then looked to the interest of the State and the defendant as affected by the allocation of burden of proof. This decision was reached even though, under Maine law, the defendant was found

guilty of felonious homicide in the first section of the by-fricated trial system, and the sentence of murder or voluntary manslaughter, was conducted in the second portion of said trial, and the issue of sudden heat of passion did not arise until the second portion of said trial.

These lines of demarcation as set out in the Mullaney decision seemed to be well founded and well established until a more recent decision of this Court. In June of 1977 the Court rendered the decision of *PATTERSON V. NEW YORK*, 432 US 197, 53 L Ed 2d 281, 97 S Ct. 2319. In the Patterson case, supra, a New York law was considered which required the defendant in a prosecution for second degree murder to prove by a preponderance of the evidence, the affirmative defense of extreme emotional disturbance in order to reduce the crime to manslaughter. While the facts, on their face appeared to be, in substance, identical to the prior Mullaney decision, this Court reached diverse results. This Court in the Patterson decision seemed to concentrate on the point that such a statute labeled its burden shifting as an affirmative defense and that the statute did not serve to negative any facts of the crime which the State had to prove in order to convict of murder. This Court then stated that it would not disturb the balance struck in the previous holding that the DUE PROCESS CLAUSE requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense. Stating that the proof of the nonexistence of all affirmative defenses has never been constitutionally required.

The dissent, by Justice Powell, joined by Justice Brennan and Justice Marshall, pointed out that the Patterson

Court had managed to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. The dissent pointed out the actual substantive similarities of Maine's law and New York's law. Such distinction of form in declaring one statute constitutional simply because it had been named an affirmative defense while the other had not, seemed to be reducing a constitutional standard to a mere label placed upon the statute. Thus, the lines of demarcation as to how far a State may go in shifting of its burden of proof became very gray.

This gray area was enlarged by a decision rendered on the same day as the Patterson decision in that *HANKERSON V. NORTH CAROLINA*, 432 US 223, 53 L Ed 306, 97 S Ct. 2339 was handed down by the Court. In the Hankerson decision the issue was whether the law which required a defendant to prove to the satisfaction of the jury that he acted in self defense, was an unlawful shifting of the burden of proof. In an earlier decision the North Carolina Supreme Court had agreed that such statute was an unlawful and unconstitutional shifting of the burden of proof as applied against the standard set by Mullaney. But that Mullaney did not apply since it was not retroactive. The Hankerson case applied Mullaney retroactively and agreed with the North Carolina Supreme Court. Justice Blackman in his dissent in the Hankerson case, state "our decision not to consider the correctness of the North Carolina Supreme Court ruling on the self defense charge . . . . . does not in any way proclude that Court from re-examing its holdings in light of the Patterson decision". Seeming to indicate that the Patterson decision may have somehow changed Mullaney. Thus, the lines as to how far a State may

go in shifting its burden of proof have become even more vague.

Appellant believes that the Georgia statute in question goes beyond any permissible limit in that it shifts the burden of proof in such a fashion as to offend a principle of justice rooted in the tradition and conscience of the people. *SPEISER V. RANDALL*, 357 US 513, 2 L Ed 2d 1460, 78 S Ct. 1332. Appellant also contends that the Georgia statute violates the undisputed language of Winship and Mullaney that a statute cannot serve to negate any facts of the crime which the State must prove in order to convict the defendant and that the DUE PROCESS CLAUSE requires a prosecutor to prove beyond a reasonable doubt all the elements included in the definition of an offense. The offense charged against appellant is that he did unlawfully sell a quantity of certain controlled substances. Simply selling such substances is not a crime, it is the unlawful selling of such substances which constitutes the crime. The unlawfulness of such acts is defined as selling, not being authorized in any provision of the Georgia Controlled Substances Act to do so. Thus, an element of the crime is that such selling is unauthorized. Yet the statute in question places the burden of proving that such selling was authorized upon the defendant, and thus alleviates the need for the State to prove that such selling was unlawful.

Appellant also states that the issues raised in this case give this Court an opportunity to more adequately define the line permissible in the shifting of the burden of proof under the DUE PROCESS CLAUSE of the Fourteenth Amendment of the United States Constitution. The standards as set out in the Winship—Mullaney decision

seem to have been somewhat blurred by the recent Patterson decision. This Court should use this opportunity to more definitely state what standards have to be met by a state in shifting any burdens of proof.

II. WHETHER GEORGIA CODE ANNOTATED SECTION 79A-1105 (Acts 1967, pp 296, 373) WHICH PLACES THE BURDEN OF PROOF, OF CERTAIN STATUTORY EXCEPTIONS, STATED WITHIN THE GEORGIA CONTROLLED SUBSTANCES ACT (Acts 1974, pp 221 223), UPON THE DEFENDANT, WAS APPLIED IN SUCH MANNER IN APPELLANT'S TRIAL SO AS TO VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the previous paragraphs Georgia Code Annotated Section 79A-1105 has been discussed as to how such statute shifts the burden of proof to a defendant in a criminal trial in violation of the DUE PROCESS CLAUSE of the Fourteenth Amendment to United States Constitution. Defendant contends that the Trial Court's application of said statute went beyond even the language of Georgia Code Annotated Section 79A-1105, and that, without any question, the Trial Court did violate the DUE PROCESS CLAUSE of the Fourteenth Amendment to the United States Constitution in its application of such statute in the case at-bar.

An inspection of the charge of the Trial Court in *MULLANEY V. WILBUR*, supra, shows that the Trial

Court charged that if the prosecution established that the homicide was both intentional and unlawful, then malice of forethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion or sudden provocation. In Patterson, supra, a similar charge was given in that the Court stated if the jury found beyond a reasonable doubt that the defendant had intentionally killed the victim, but that the defendant had by a preponderance of the evidence shown that he acted in an extreme emotional disturbance, they should find him guilty of manslaughter.

The Trial Court in the case at bar, did not charge that the state must prove anything before the jury must look to the defendant. The Court simply charged as a matter of law ". . . that this defendant does not come within any exception authorized by the Georgia Controlled Substances Act."

Georgia Code Annotated Section 79A-1105 simply places the burden of proof of such exception, excuse, proviso which may exist upon the defendant. The Trial Court's charge did not place this burden upon defendant, but charged as a matter of law that defendant did not fall within any such stated exceptions. Such charge eliminated the necessity of the State to prove part of the definition of the crime as set out in the Prohibited Acts section of the Georgia Controlled Substances Act. Such an application of the Georgia Code Annotated Section 79A-1105 is unconstitutional as it violates defendant's rights to due process of law, as set out in the DUE PROCESS CLAUSE of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

April 23, 1979

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

APPENDIX A

Decision of the Court of Appeals of the State of Georgia (*Ault v. The State*, file no. 57045, dated January 11, 1979).

BELL, Chief Judge.

Defendant was convicted of two counts of violating the Georgia Controlled Substances Act by selling quantities of amphetamine and chloral hydrate. *Held:*

1. A preliminary hearing is not a required step in a criminal prosecution. Moreover, once an indictment by grand jury is obtained, the failure to hold a commitment hearing is not cause for reversal. *Butts V. State*, 141 Ga. App. 634 (234 SE2d 176).

2. Defendant concedes in his brief that the district attorney produced certain documents, pursuant to defendant's motion. Defendant now alleges that the court erred in denying defendant's motion to produce evidence in the state's file specifically concerning an alleged "quota system" of arrests and grant funding. However, defendant has failed to indicate the materiality and favorable nature of the evidence sought which he must do in order to prevail on this point. *Stevens v. State*, 242 Ga. 34 (247 SE2d 838).

3. There was no error in allowing a state witness to testify when his name was not on the list of witnesss supplied by the state. The witness' name appeared on the indictment and there was no objection made to his testifying at trial. *Garvin v. State*,144 Ga. App. 396 (240 SE2d 925).

4. Defendant objected to the testimony of the state's expert witness concerning the physiological effect of ingestion of certain drugs because on direct examination

the witness was qualified only as an expert in qualitative drug analysis. However, defense counsel, on cross examination, elicited testimony indicating that the witness was qualified to testify as to the result of the ingestion of certain drugs. In any event even if it was error to admit it, it was harmless as it was improbable that this testimony contributed to the guilty verdict. *Johnson v. State*, 238 Ga. 59 (230 SE2d 869).

5. Contrary to defendant's assertions, a proper chain of custody was shown for the admission of the seized drugs. Both the arresting officer and the witness from the State Crime Laboratory testified that the items had remained in their respective continuous care, custody and control. It was proper to admit the evidence. *Toole v. State*, 146 Ga. App. 305 (246 SE2d 338).

6. There was no error in allowing certain heresay testimony of a state's witness explaining how he first learned the actual name of the person who had sold him the drugs. Code § 38-302. In addition, the court stated in the presence of the jury that the evidence was to be considered solely for the purpose of explaining conduct.

7. The state showed ample independent opportunity for the witness to have observed defendant prior to trial; therefore, under the totality of the circumstances, the in-court identification was properly allowed. *Sherwin v. State*, 234 Ga. 592 (216 SE2d 810).

8. The burden of proof negativing the state's allegation that defendant was not authorized under any provision of the Georgia Controlled Substances Act to sell certain substances is on the defendant. Code Ann. § 79A-1105. The constitutionality of this statute has been upheld, and it was not repealed by Code § 26-501. *Woods v. State*,

233 Ga. 347 (211 SE2d 300).

9. The enumeration concerning a portion of the court's charge on reasonable doubt has no merit.

10. A record of one prior felony conviction was offered in evidence and considered by the court in imposing sentence. The copy of this prior conviction in the record of this case is incomplete as it fails to show that defendant was represented by counsel at his prior trial. This prior conviction was reviewed by us. See *Manis v. State*, 135 Ga. App. 71 (217 SE2d 396). The record on file in this court of which we take judicial notice clearly reveals that defendant and his co-defendant were represented by counsel at trial and on appeal. Consequently, it was not error for the trial court to consider this prior conviction in this case. See *Mitchell v. State*, 136 Ga. App. 390 (221 SE2d 465).

Judgment affirmed. Webb and Banke, JJ., concur.

APPENDIX B

Order denying a motion for rehearing which was issued by the Court of Appeals in the State of Georgia, on January 25, 1979.

COURT OF APPEALS OF THE STATE OF GEORGIA ATLANTA, JANUARY 25, 1979

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

57045. *Larry Ault v. State*

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Signed,

MORGAN THOMAS, Clerk,
Court of Appeals of
The State of Georgia,
January 25, 1979

APPENDIX C

An order denying an application for a writ of certiorari rendered by the Supreme Court of Georgia, on March 7, 1979.

SUPREME COURT OF GEORGIA
ATLANTA, MARCH 7, 1979

34781. *Larry Ault v. State*

The Supreme Court today denied the writ of certiorari in this case. All the justices concur.

Very truly yours,
MRS. JOLINE B. WILLIAMS,
Clerk

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

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I N D E X

TABLE OF AUTHORITIES

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ON PETITION FOR WRIT OF CERTIORARI
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BRIEF IN OPPOSITION FOR THE RESPONDENT

QUESTIONS PRESENTED

1.

Whether Ga. Code Ann. § 79A-1105 is constitutional in providing that the State is not required to negate any exception or exemption contained in the Georgia Controlled Substances Act.

2.

Whether the application of Georgia Code Ann. §79A-1105 by the trial court in the case at bar was constitutional under the Fourteenth Amendment.

STATEMENT OF THE CASE

Petitioner was indicted by the Superior Court of Whitfield County, Georgia, in 1977 on two counts of violation of the Georgia Controlled Substances Act by selling amphetamines and chloral hydrate. (R. 4-5). At trial, Georgia Bureau of Investigation agent Mark Lengel testified that Petitioner, Larry Ault, sold controlled substances to him on two separate occasions. (T. 30-41). Petitioner's defense was that a girl with him actually did the selling. (T. 86, et. seq.). Petitioner testified that he knew the sale was taking place, but that he did not participate. At no time did Petitioner assert that he was authorized to make the sales.

At the conclusion of the testimony, the trial court thoroughly charged the jury on reasonable doubt and the presumption of innocence. (T. 116). As Petitioner had not raised a defense of being authorized to sell controlled substances, the court further charged as follows:

> "I charge you that, except as authorized by the Georgia Controlled Substances Act, it is unlawful and it is a felony for any person to sell any Controlled Substance. I charge you that this defendant does not come within any exception authorized by the Georgia Controlled Substances Act."

(T. 120). Petitioner did not object to the charge.

The jury returned a verdict of guilty on both counts on December 14, 1977. (T. 122).

Petitioner was sentenced on December 15, 1977.

Petitioner filed a motion for new trial on January 6, 1978, in which the issues presented to this Court were raised. (R. 51-53, 67-73). Petitioner's motion was overruled by the trial court on August 23, 1978. (R. 77).

On September 19, 1978, Petitioner filed a notice of appeal to the Georgia Court of Appeals. (R. 1,2). The two issues raised in the present petition were presented to the Court of Appeals. On January 11, 1979, the Court of Appeals affirmed Petitioner's convictions, holding in part:

> "The burden of proof negativing the state's allegation that defendant was not authorized under any provision of the Georgia Controlled Substances Act to sell certain substances is on the defendant. Code Ann. § 79A-1105. The constitutionality of this statute has been upheld and it was not repealed by Code § 26-501."

Ault v. State, 148 Ga. App. 761, 763, 252 S.E.2d 668 (1979), citing Woods v. State, 233 Ga. 347, 211, S.E.2d 300 (1974).

Petitioner's motion for rehearing was denied on January 25, 1979. The Supreme Court of Georgia denied the application for certiorari on March 7, 1979. A petition for a writ of certiorari was filed in this Court on June 4, 1979 to review the decision of the Court of Appeals of Georgia.

Further facts will be discussed as necessary for a more thorough illumination of the issues raised by the present petition.

REASONS FOR NOT GRANTING THE WRIT

A. THE COURT OF APPEALS OF GEORGIA PROPERLY UPHELD THE CONSTITUTIONALITY OF GEORGIA CODE ANNOTATED § 79A-1105, AS IT DOES NOT IMPROPERLY SHIFT THE BURDEN OF PROOF TO A DEFENDANT.

Petitioner alleges that Ga. Code Ann. § 79A-1105 creates an unconstitutional presumption that is violative of the due process clause of the Fourteenth Amendment of the United States Constitution. Petitioner asserts that before the selling of a controlled substance can be a crime it must fall outside of the exception. Petitioner therefore asserts that the statutory requirement does not meet the test for presumptions set out by this Court in Tot v. United States, 319 U.S. 463, 467 (1942) and subsequent cases. Petitioner further asserts that this provision violates the holding of this Court in Mullaney v. Wilbur, 421 U.S. 684 (1974) by being impermissibly burden shifting and negating the facts of the crime. Respondent submits that the statute in question does not impermissibly shift the burden to the defendant and is not violative of the United States Constitution.

Petitioner was convicted of violations of the Georgia Control Substances Act. The prohibited acts are set out in Ga. Code Ann. § 79A-811.

The violation in the case at bar is set out in § 79A-811(b):

> "Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, distribute, dispense, administer, sell or possess with intent to distribute any controlled substance."

Ga. Code Ann. § 79A-1105 provides as follows:

> "In any complaint, information or indictment charging any violation of any provision of this Title, and in any action or proceedings brought for the enforcement of any provision of this Title, it shall not be necessary to negative any exception, excuse, proviso or exemption contained in this Title, and the burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant."

Similar statutes exist in several states as well as in the United States Code. In United States ex. rel. Kirchner v. Johnstone, 554 F. Supp. 14(E.D. Pa. 1978), the Pennsylvania District Court considered a similar provision in the Pennsylvania Code in its relationship to the case where, as in the case at bar, no evidence was presented by the prosecution that the defendant did not fall within a statutory exception. The court noted that the key question was whether the exception was an essential element of the crime. The District Court went on to note that

the Pennsylvania courts had interpreted the provision as not being an element of the crime but as a personal defense.

> "The exemption clauses in those sections do not refer to conduct, i.e., to essential elements of the crimes (possession, sale, manufacture, or delivery), but to persons who are to be exempted (persons 'registered under this Act'). Thus, the exemption applies if the accused has obtained a certain status; it has nothing to do with the conduct that would constitute a crime if performed by someone else. Status does not constitute an essential element of the crimes, rather it only provides a personal defense. Thus the burden of proving it can be constitutionally shifted to the person claiming it."

(Emphasis in original). Kirchner, supra, at 17, citing Commonwealth v. Stawinsky, 234 Pa. Super. 308, 339 A.2d 91, 94-5 (1975). 1/

A similar statutory provision exists in the federal code at 21 U.S.C. § 885(a)(1), which provides that the United States is not required

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1/ Similar statutory provisions have also been upheld in Florida, Maryland and Michigan. Purifoy v. State, 359 So. 2d 446 (Fla. 1978); Moor v. State, 384 A. 2d 103 (Md. App. 1978); People v. Beatty, 78 Mich. App. 510, 259 N.W. 2d 892 (1977).

to negative an exemption or exception under that chapter. In United States v. Rowlette, 397 F.2d 475 (7th Cir. 1968), the defendants urged that the government was required to negative the exceptions and exemptions. The court held that if the defendant came within an exception or exemption in the statute, it was necessary for him to set up and establish it as a defense. See McKelvey v. United States, 260 U.S. 353, 357 (1922); United States v. Safeway Stores, 252 F.2d 99, 101 (9th Cir. 1958). The court held:

> "In our opinion the exceptions or exemptions specified in § 360a may, insofar as burden of proof is concerned, be equated with the affirmative defenses. Whether a defendant and his activity occupy an exempt status is a matter peculiarly within his knowledge and with respect to which he can be fairly expected to aduce the proof. The burden of proving the facts necessary to establish such an affirmative defense is upon the defendant."

Rowlette at 479.

In upholding the statute attacked in the case at bar, the Georgia Supreme Court has specifically stated that "Whether an individual has a license or is otherwise lawfully permitted to have in his possession narcotic drugs under Title 79A is a matter of defense and not an element of the offense." Woods v. State, supra, at 349. Thus, it is clear that under Georgia law the exceptions or exemptions to the prohibited acts of the Georgia Controlled Substances Act are affirmative defenses to be set forth by the

defendant and do not constitute elements of the offense to be proven by the State. Under Georgia law, it is not the "unlawful selling" that is a crime, but it is the selling of any controlled substance specified under the Act that constitutes a crime. Ga. Code Ann. § 79A-811(b). As a defense to this crime, once the State has proven the elements necessary to show the selling, the defendant can establish that he was authorized under the statutes to sell the controlled substance in question. The burden of going forward with the evidence can properly be placed on the defendant after the prosecution has "proven enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression." Speiser v. Randall, 357 U.S. 513, 524, (1958), quoting Morrison v. California, 291 U.S. 82, 88-89, (1933).

Respondent therefore submits that in the statute in question, there is no impermissible presumption created. Rather, the statute sets out the crime and then provides the defenses that are available by the defendant. As the Georgia Supreme Court has interpreted the statute as requiring the exceptions to be set out as defenses and not as elements of the crime, the statute is not unconstitutional in violation of the Fourteenth Amendment. Thus, the Georgia Court of Appeals properly upheld the constitutionality of the statute in question. Respondent submits that this Court should decline to review Petitioner's case as there is no impermissible presumption involved.

B. THE APPLICATION OF GEORGIA CODE ANNOTATED § 79A-1105 IN THE CHARGE OF THE TRIAL COURT WAS PROPER.

Petitioner asserts that by charging " . . . that this defendant does not come within any exception authorized by the Georgia Controlled Substances Act," the trial court violated Petitioner's Fourteenth Amendment rights. Petitioner asserts that this charge removed the requirement of the State proving every element of the crime.

Respondent has already shown that the "unauthorized" provision of the statute is an affirmative defense and, thus, is not an element of the crime that the State must prove. See Woods v. State, supra. Furthermore, the portion of the charge in question was not burden-shifting. The court merely noted that the defendant had not shown he was "authorized." As the defendant made no contention at trial that he fit within an exception or exemption, it was proper for the court to remove this point from the jury's consideration.

The Georgia courts have consistently upheld this type of charge.

> "While the trial court may not express an opinion as to what has been proved in the case . . ., where only one inference is possible from the evidence it is not improper for the court to assume the fact to be true. Morton v. State, 190 Ga. 792, 801 (10 S.E.2d 836). The general rule is that the selling of narcotics is a criminal offense, the exception

> being as to certain professionals who are licensed to handle and sell them. . . . The defendant made no contention that he was within this class [of persons], and the evidence demanded a finding that he was not."

Lyle v. State, 131 Ga. App. 8, 11, 305 S.E.2d 126 (1974), quoting Green v. State, 129 Ga. App. 27(2), 198 S.E.2d 343 (1973).

Respondent therefore argues that as the charge merely stated a finding that was demanded from the evidence, there was no error. Furthermore, the charge was not impermissibly burden-shifting because all elements of the crime were established by the State. The Court merely instructed the jury that Petitioner had not established the defense of "authorization." Thus, there is no merit to this issue raised in the petition for a writ of certiorari.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court to deny the petition for writ of certiorari filed on behalf of Larry Ault.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John C. Walden, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent upon the Petitioner by depositing three copies of same in the United States mail, with proper address and adequate postage to:

Mr. Steve K. Fain
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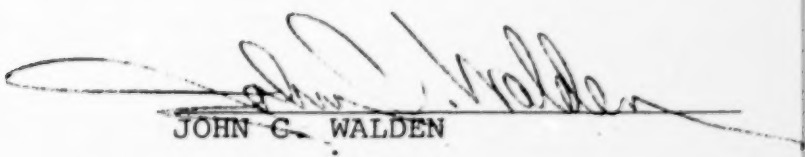
P. O. Box 1678
Dalton, Georgia 30720

This 22nd day of August, 1979.



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